FILED
JUL 1 1991
OFFICE OF THE CLERK

No. 90-1852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF TAXATION,
Petitioner,

v.

CORNING GLASS WORKS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF ARKANSAS, CONNECTICUT, DELAWARE, ILLINOIS, INDIANA, IOWA, MARYLAND, MICHIGAN, MINNESOTA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VERMONT, WEST VIRGINIA, AND WISCONSIN, AS AMICI CURIAE IN SUPPORT OF PETITIONER

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GERALD LANGBAUM *
Assistant Attorney General

JOHN K. BARRY
Assistant Attorney General

Louis L. Goldstein Treasury Bldg.
Calvert & Northwest Streets
P. O. Box 466
Annapolis, Maryland 21404
(301) 974-2808

* *Counsel of Record for Amici Curiae*

(Counsel Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

WINSTON BRYANT
Attorney General
of Arkansas

RICHARD BLUMENTHAL
Attorney General
of Connecticut

CHARLES M. OBERLY III
Attorney General
of Delaware

ROLAND W. BURRIS
Attorney General
of Illinois

LINLEY E. PEARSON
Attorney General
of Indiana

BONNIE J. CAMPBELL
Attorney General
of Iowa

J. JOSEPH CURRAN, JR.
Attorney General
of Maryland

FRANK J. KELLEY
Attorney General
of Michigan

HUBERT H. HUMPHREY, III
Attorney General
of Minnesota

JOHN P. ARNOLD
Attorney General
of New Hampshire

ROBERT J. DEL TUFO
Attorney General
of New Jersey

TOM UDALL
Attorney General
of New Mexico

LACY H. THORNBURG
Attorney General
of North Carolina

NICHOLAS J. SPAETH
Attorney General
of North Dakota

ERNEST D. PREATE, JR.
Attorney General
of Pennsylvania

T. TRAVIS MEDLOCK
Attorney General
of South Carolina

R. PAUL VAN DAM
Attorney General
of Utah

JEFFREY L. AMESTOY
Attorney General
of Vermont

MARIO J. PALUMBO
Attorney General
of West Virginia

JAMES E. DOYLE
Attorney General
of Wisconsin

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTORY STATEMENT	1
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. INTRODUCTION: THE UNITARY BUSINESS PRINCIPLE	4
II. ASARCO HAS PRODUCED SUBSTANTIAL CONFLICT	5
III. OWNING STOCK CAN BE A UNITARY BUSINESS ACTIVITY	9
IV. THE VIRGINIA SUPREME COURT'S INTERPRETATION PROMOTES TAX AVOIDANCE	12
CONCLUSION	15

TABLE OF AUTHORITIES

Cases: Page

Adams Express Co. v. Ohio State Auditor, 166 U.S. 185 (1897) 13

Amerada Hess Corp. v. Director, 490 U.S. 66 (1989) 5

ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982) ..... *passim*

Bendix Corp. v. Director, 10 N.J. Tax 46 (1988), *aff'd*, 237 N.J. Super. 328, 568 A.2d 59 (1989), *appeal pending*, N.J. Sup. Ct. No. 31,140 8

Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983) ..... *passim*

Corn Products Refining Co. v. Commissioner, 350 U.S. 46 (1955) 11

Exxon Corp. v. Wisconin Dep't of Revenue, 447 U.S. 207 (1980) 4

International Paper Co. v. Taxation Division Director, 11 N.J. Tax 147 (1990), *aff'd*, —— N.J. Tax —— (App. Div.) (1991) 8, 9

James v. Int'l Tel. & Tel. Corp., 654 S.W.2d 865 (Mo. 1983) 8

Lone Star Steel Co. v. Dolan, 668 P.2d 916 (Colo. 1983) 8

Macy & Co. v. Lindley, 25 Ohio St. 3d 218, 495 N.E.2d 948 (1986) 10

M. Lowenstein Corp. v. South Carolina Tax Comm'n, 298 S.C. 93, 378 S.E.2d 272 (Ct. App. 1989) 8

Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425 (1980) ..... *passim*

Mobil Oil Corp. v. Director, 11 N.J. Tax 344 (1990), *appeal pending*, N.J. Super. Ct. App. Div. No. A-2326-90T5 8

NCR Corp. v. Comptroller, 313 Md. 118, 544 A.2d 764 (1988) 7, 8, 12

Shell Oil Co. v. Dep't of Revenue, 488 U.S. 19 (1988) 12

Silent Hoist & Crane Co. v. Director, 100 N.J. 1, 494 A.2d 775, *cert. denied*, 474 U.S. 995 (1985) .. 8

State Railroad Tax Cases, 92 U.S. 575 (1875) 3

TABLE OF AUTHORITIES—Continued

Page

Trinova Corp. v. Michigan Dep't of Treasury, —— U.S. ——, 111 S. Ct. 818 (1991) 4, 5, 12
U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) 3
Williams Cos. v. Director, 799 S.W.2d 602 (Mo. 1990), *petition for cert. filed* Mar. 18, 1991, Docket No. 90-1458 9
Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) .. 4, 14

Miscellaneous:

U.S. Sup. Ct. R. 37 1
Dexter, *The Unitary Business Principle Revisited: Restrictions on Its Use*, 8 J. St. Tax'n 205 (1990) 7
Hellerstein, *State Taxation: I Corp. Income & Franchise Taxes* (Cum. Supp. 1989) 7
W. Hellerstein, *State Income Taxation of Multijurisdictional Corporations, Part II: Reflections on ASARCO and Woolworth*, 81 Mich. L. Rev. 157 (1982) 11
P. Hartman, *Federal Limitations on State and Local Taxation* (Cum. Supp. 1990) 10, 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1852

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF TAXATION,
Petitioner,
v.
CORNING GLASS WORKS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

BRIEF OF ARKANSAS, CONNECTICUT, DELAWARE, ILLINOIS, INDIANA, IOWA, MARYLAND, MICHIGAN, MINNESOTA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VERMONT, WEST VIRGINIA, AND WISCONSIN, AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 37.2, the signatory states submit this Brief as Amici Curiae in support of Virginia's Petition for a Writ of Certiorari. Because this Brief is sponsored and filed by the aforementioned states, consent to its filing is not required. U.S. Sup. Ct. R. 37.5.

INTEREST OF AMICI CURIAE

This case concerns the due process legal standards governing the allocation of authority among the states to tax income from intangibles. Under the "unitary business principle," each state in which a corporation operates has the right to tax, on a fairly apportioned basis, the corporation's entire net income from unitary business activities. This federal judicial concept defines the scope of nondomiciliary states' authority to tax foreign corporations and, therefore, is applicable to Amici because they impose apportioned income taxes based on formulas measuring the taxpayer's in-state activities.[1]

The signatory Amici believe that the Virginia Supreme Court's decision in this case incorrectly interprets *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982) ("*ASARCO*") to remove income from intangibles from the apportionable income base unless the state can prove a unitary business relationship between the income-payor and the income-recipient. This overly restrictive approach ignores the presumptively unitary character of a single corporation's income and activities. Moreover, such an approach virtually assures that a significant portion of a corporation's income will escape all state taxation, notwithstanding the benefits conferred by the several states upon the corporations conducting their businesses within the states' borders. The Amici urge this Court to grant the writ to decide the proper legal standards to apply in determining the apportionability of income from intangibles, an issue of sufficient importance and general applicability to warrant the grant of certiorari. The many divergent state court interpretations of *ASARCO* have created confusion and uncertainty for taxpayers, Amici States and other States alike.

---

[1] The State of Michigan does not impose an income tax, but does impose an apportioned value-added tax which includes capital gains in the tax base.

SUMMARY OF ARGUMENT

State courts of last resort have interpreted *ASARCO* in conflicting ways, applying drastically different legal standards in determining whether the federal due process clause permits apportionment of income from intangibles. The lack of uniformity concerning the due process legal standards governing application of the unitary business principle to income from intangibles creates inequities and problems for states and taxpayers. The unitary business principle, as a federal judicial concept, should have a uniform interpretation that only this Court can provide.

The Virginia Supreme Court and some other courts have interpreted *ASARCO* in a way that overly restricts the power of the states to tax income from intangible assets. Other courts have appropriately limited *ASARCO* to its facts. Therefore, this case involves an important question of federal law that needs to be settled by this Court so as to give guidance to state courts with respect to the application of the federal unitary business principle.

ARGUMENT

I. INTRODUCTION: THE UNITARY BUSINESS PRINCIPLE

The unitary business principle is a federal judicial concept initially applied to sustain apportioned state taxation of interstate railroad property. *See State Railroad Tax Cases*, 92 U.S. 575 (1875). The concept was later extended to state corporate income taxes where it has been used for two distinct purposes: (1) to measure the entire net income of a single corporation from all activities deemed to constitute part of a single unitary business enterprise; and (2) to combine the income of two or more separate corporations deemed to constitute a single business enterprise. *See U. S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 473 n. 25 (1978).

This case concerns the first of these purposes and addresses the application of the unitary business principle to measure the entire net income of a single integrated glass manufacturing company from its unitary stock ownership activities. Presumptively all of the income of a single corporation is unitary and apportionable. *See Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 219 (1980) (*"Exxon"*); *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 436 (1980) (*"Mobil"*). Due process requires only that there be (1) a "minimal connection" or nexus between the interstate activities and the taxing state, and (2) a "rational relationship" between income attributed to the state and the intrastate values of the enterprise. *Trinova Corp. v. Michigan Department of Treasury*, —— U.S. ——, 111 S.Ct. 818, 828 (1991) (quoting *Mobil*, 445 U.S. at 443). *See also Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-45 (1940) (*"J.C. Penney"*). It is the taxpayer's burden to prove by "clear and cogent evidence" that the constitutional requirements are not met. *Trinova*, 111 S.Ct. at 832 (citations omitted).

The original rationale for the unitary business principle was the difficulty of identifying the geographic source of the income earned by a multistate enterprise. *Trinova*, 111 S. Ct. at 829. Factors contributing to this difficulty include functional integration, centralization of management and economies of scale. *Id.* at 832. Because of the impracticability of assuming that all income can be assigned to a single source, the unitary business principle

> rejects geographical or transactional accounting, and instead calculates the local tax base by first defining the scope of the "unitary business" of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that "unitary business" between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures

> of the corporation's activities within and without the jurisdiction.

Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 165 (1983) ("*Container*").

Under the unitary business principle, the fact that the source of particular income may be ascertained by separate geographical accounting is constitutionally irrelevant. So long as the income-producing activity is part of a unitary business, the income is includable in the apportionable income base. *Trinova*, 111 S. Ct. at 831 (quoting *Mobil*, 445 U.S. at 438); *Amerada Hess Corp. v. Director*, 490 U.S. 66, 73 (1989) (fact that activity occurring entirely outside the state is conducted by a unitary business establishes a substantial connection satisfying nexus requirement).

II. ASARCO HAS PRODUCED SUBSTANTIAL CONFLICT

While the general contours of the unitary business principle are well established, state appellate courts fundamentally disagree on the legal standards applicable when the income sought to be apportioned arises from intangible assets, particularly capital stock. The focal point of disagreement is this Court's decision in *ASARCO*. Interpretations of *ASARCO* range from a narrow, fact-specific view to the extremely broad view of the Virginia Supreme Court in this case. Some courts have interpreted *ASARCO* to prescribe an exclusive bright-line test which mandates a unitary business relationship between the income-payor and the income-recipient as a prerequisite to taxing income from intangibles. The Virginia Supreme Court applied this incorrect legal standard in this case. Other courts have appropriately limited *ASARCO* to its own peculiar facts and have gone further to determine whether the income-producing asset or activity is part of a single corporation's unitary business.

ASARCO concerned the authority of the State of Idaho to include certain income from intangibles (capital stock) in the apportionable income base of a nondomiciliary corporation that conducted a unitary nonferrous metals business in part within Idaho. The income in question consisted primarily of dividends paid by five foreign corporations having no contacts with Idaho. Minor amounts of capital gains and interest from ASARCO's sale of its stock in two of the corporations were also involved. *Id.* at 310.[2]

On these facts, this Court reversed the decision of the Idaho Supreme Court sustaining the apportionability of the income in question. In so holding, the majority specifically relied on the state trial court's findings that ASARCO

> "has never been required to utilize its stock as security for borrowing of working capital, acquiring stock or securities in other companies or to support any bond issues." Moreover, ASARCO was found to have "sufficient cash flow from mining to provide operating capital for all mining operations without reliance upon cash flow from . . . income from intangibles."

458 U.S. at 325 n.21 (quoting from the trial record).

The foregoing passage from *ASARCO* lies at the heart of the conflict between state court decisions involving the apportionability of income from intangibles. Courts fundamentally disagree on the significance of facts concern-

---

[2] The joint appendix in *ASARCO* reflects that over 90% of the income at issue was the foreign subsidiaries' dividend payments. *ASARCO* also involved minor amounts of capital gains and interest that ASARCO received from its sale of two of the "subsidiaries'" stock. *See* 458 U.S. at 329-30. The stock apparently was sold to unrelated third parties. Neither the majority nor the dissent attaches significace to the identity of the "payors" of ASARCO's capital gains and interest since Idaho conceded that the treatment of the dividends would control the treatment of the capital gains and interest. *See id.* at 330. The Virginia Supreme Court has now elevated Idaho's concession to constitutional doctrine.

ing the role of the income-producing asset or activity in the taxpaying corporation's business. The Amici maintain that if facts show that the income-producing asset or activity has an operational function in the taxpaying corporation's unitary business, such facts are relevant and demonstrate the apportionability of the income in question. *See ASARCO*, 458 U.S. at 325 n.21, 327 n.22; *Container*, 463 U.S. at 180 n.19.[3]

In contrast to the decision below, courts of last resort in other states have held that income from intangibles is apportionable if the facts establish that the income is generated by investments that are used to advance the operations of the unitary business. For example, in *NCR Corporation v. Comptroller*, 313 Md. 188, 544 A.2d 764, 770-75 (1988), the Maryland Court of Appeals reversed the decision of the trial court which relied on *ASARCO* to exclude interest from apportionment. The Court of Appeals stated:

> What is important about *ASARCO* is its factual foundation. The subsidiaries in question there were discrete business enterprises, that is, they had no connection whatsoever with ASARCO's Idaho activities.

---

[3] Several leading commentators in this area have concurred:

> interest and dividends are properly apportionable to the recipient, irrespective of whether the payor is part of the taxpayer's unitary business being carried on in the taxing State, if the stocks or obligations on which the dividends or interest are being paid constitute assets employed by the taxpayer in its unitary business.

Hellerstein, *State Taxation: I Corp. Income & Franchise Taxes* § 9.12[3] at S300 (Cum. Supp. 1989).

> all income should be apportioned to the extent that it is derived from investments that further the unitary business of the taxpayer. Cardinal examples [include] . . . investments made to expand business operations . . . . In all of these examples, the nature of the investment and the relationship of the investor to the business or activity invested in by the taxpayer are totally immaterial.

Dexter, *The Unitary Business Principle Revisited: Restrictions on Its Use*, 8 J. St. Tax'n 205, 213 (1990).

> The interest payers here involved were also not part of NCR's business machine enterprise, nor were they controlled by NCR. But to paraphrase *Mobil*, only if "the income was earned in the course of activities unrelated to [NCR's unitary activities in Maryland]" would Maryland be prevented from taxing it.
>
> * * * *
>
> The evidence before the Tax Court did not show that the investments which produced the DPI [interest] were passive. They were actively monitored and carefully timed so as to meet NCR's operating needs. And they did not arise out of a distinct business operation—that is, a money-lending operation, as opposed to the business machine business.

544 A.2d at 772, 774. In this case, the state trial court correctly applied this same fact-based view of *ASARCO*, only to be reversed by the Virginia Supreme Court.

The New Jersey Supreme Court applied a similar fact-based analysis in *Silent Hoist & Crane Co. v. Director*, 100 N.J. 1, 494 A.2d 775, *cert. denied*, 474 U.S. 995 (1985) which concerned the apportionability of a single corporation's portfolio investment income from various nonunitary enterprises. The New Jersey Supreme Court held that the income was apportionable because the investment activity was one of several centrally managed unitary business activities of a single corporation.[4]

---

[4] Other courts have utilized similar analyses in determining the apportionability of income from intangibles. *Bendix Corp. v. Director*, 10 N.J. Tax 46 (1988), *aff'd*, 237 N.J. Super. 328, 568 A.2d 59 (1989), *appeal pending* N.J. Sup. Ct. No. 31, 140; *M. Lowenstein Corp. v. South Carolina Tax Comm'n*, 298 S.C. 93, 378 S.E. 2d 272, 276-78 (Ct. App. 1989); *Lone Star Steel Co. v. Dolan*, 668 P.2d 916, 924-25 (Colo. 1983). *Contra, e.g., James v. Int'l Tel. & Tel. Corp.*, 654 S.W.2d 865 (Mo. 1983); *Mobil Oil Corp. v. Director*, 11 N.J. Tax 344 (1990), *appeal pending*, N.J. Super. Ct. App. Div. No. A-2326-90-T5. *See also International Paper Co. v. Taxation Division Director*, 11 N.J. Tax 147 (1990), *aff'd*, —— N.J. Tax —— (App. Div. 1991) (Bard stock issue). One need look no further than the cited New Jersey decisions to see the difficulties state courts

The recent decision of the Missouri Supreme Court in *Williams Cos. v. Director*, 799 S.W.2d 602 (Mo. 1990), *petition for cert. filed* Mar. 18, 1991, Docket No. 90-1458, appropriately recognizes that there are at least *two* tests of apportionability applicable to income from intangibles. The Missouri Supreme Court held that income from intangibles is unitary and apportionable if *either* the income-producing asset or activity is part of the taxpayer's unitary business *or* if the taxpayer and the income-payor corporation are a unitary business. Thus, the court in *Williams* held that interest on intercorporate loans was unitary and apportionable even though managing funds was not an integral part of the lender's business because the lending subsidiary and the parent company payors were parts of a unitary business. 799 S.W.2d at 606. Capital gains from preferred stock in an independent company engaged in the same line of business, on the other hand, were held apportionable because the investment was part of the taxpayer's unitary business. *Id.* at 607.

III. OWNING STOCK CAN BE A UNITARY BUSINESS ACTIVITY

The bright-line unitary payor/payee test applied by the Virginia Supreme Court ignores the fact that most businesses fall along a continuum somewhere between the paradigms of a highly integrated business which bene-

---

have in trying to apply the principles of *ASARCO* and *Container* to the cases before them. Compare *e.g.* the majority opinion of the New Jersey Tax Court in *International Paper*, 11 N.J. Tax at 163, finding the facts relating to the Bard stock to be analogous to those in *ASARCO* with the dissenting opinion which relied on *Container Corp.* to conclude that there was a sharing of value sufficient to make the capital gain on the Bard stock unitary. 11 N.J. Tax at 172. The lower courts' inability to develop coherent legal principles which would provide focus to the intensely factual unitary business inquiries results in a tremendous burden upon taxpayers and state tax officials alike.

fits from an umbrella of centralized management and controlled interaction on the one hand, and a highly decentralized conglomerate consisting of many diverse businesses on the other. *See* P. Hartman, *Federal Limitations on State and Local Taxation*, § 9.30, at 445 (Supp. 1990).[5]

Requiring a unitary payor as a constitutional prerequisite to apportionability unduly limits application of the unitary business principle to businesses fitting the high integration model and improperly excludes income from intangibles from the apportionable income base. Under the Virginia Supreme Court's overly broad reading of *ASARCO*, even a highly integrated and centrally managed business like Corning may exclude interest and stock gains from apportionment if the state cannot prove a unitary business relationship with the income-payor. There is no basis in the constitutional text or this Court's decisions to support such an exclusion. If the corporation's stock ownership activities are part of its unitary business and not a discrete business enterprise, the income from the stock is includable in the corporation's apportionable income base. *See Mobil*, 445 U.S. at 439-40.

---

[5] A business may be vertically or horizontally integrated for purposes of assessing its unitariness. *See Macy & Co. v. Lindley*, 25 Ohio St.3d 218, 495 N.E.2d 948, 950 n.1 (1986), where the court stated:

> "Vertical integration" refers to a business organized into separate divisions, each performing an entirely separate function, such as production, marketing and retailing of the same product. Horizontal integration describes a business where each division performs basically the same function in different locations—for example, a retail chain.

See also P. Hartman, *supra*, at 412 n.17 (explaining three types of integration identified in U.S. Supreme Court opinions—(1) functional or vertical integration; (2) managerial integration or contralization of management; and (3) horizontal integration or economies of scale).

This Court's decision in *Container* leaves no doubt that owning stock can be a unitary business activity. A corporation's ownership of stock in other corporations can serve either an investment function or an operational function. *Container*, 463 U.S. at 180 n.19 (citing *Corn Products Refining Co. v. Comm'r*, 350 U.S. 46, 50-53 (1955)). When, as in *Corning*, the investment is made in a corporation engaged in a related line of work, "it becomes much more likely that one function of the [stock] investment is to make better use—either through economies of scale or through operational integration or sharing of expertise—of . . . existing business-related resources." *Container*, 463 U.S. at 178. Moreover, investments in corporations engaging in different lines of business 'often serve[] the primary function of diversifying the corporate portfolio and reducing the risks inherent in being tied to one industry's business cycle." *Container*, 463 U.S. at 178. Whenever the stock ownership activity serves an operational function in the investor's unitary business—*e.g.*, if the stock is used to provide income for operations, if it is used as security to borrow working capital, acquire stock or securities in other companies or to support bond issues (*see Container*, 463 U.S. at 180 n.19; *ASARCO*, 458 U.S. at 325 n.21)—the stock ownership activity is unitary and the resulting income apportionable. *See* P. Hartman, *supra*, at 441 (a "taxpayer's investments may be so integrally involved in the taxpayer's own business operations that the income should be included in the payee's apportionable tax base" "without any requirement of functional integration or centralized control of payor and payee") (quoting W. Hellerstein, *State Income Taxation of Multijurisdictional Corporations, Part II: Reflections on ASARCO and Woolworth*, 81 Mich. L. Rev. 157, 181 (1982)).

What is relevant in the case of a centrally managed corporation like Corning is the function of the stock ownership activity in the taxpaying corporation's unitary business. In Corning's case, owning stock in related cor-

porations served a variety of unitary business purposes—repaying loans, issing debentures, diversification, expansion, developing new markets, learning new technologies. This centrally managed unitary stock ownership activity was no less unitary than Corning's sales of glassware products. Income from all unitary business activities—owning stock, manufacturing and selling glass products—is apportionable regardless of the taxpayer's relationship to the income-payor.

IV. THE VIRGINIA SUPREME COURT'S INTERPRETATION PROMOTES TAX AVOIDANCE

Including income from intangibles in the apportionable income base creates no risk of distortion or extraterritorial taxation. Adjustments to the three-factor apportionment formula are the appropriate remedy for concerns about unfair distortion or extraterritorial taxation, which the taxpayer must prove by clear and cogent evidence. See *Trinova*, 111 S. Ct. at 832. *See also Shell Oil Co. v. Dep't of Revenue*, 488 U.S. 19, 30-31 (1988) (mere inclusion of income in preapportioned tax base does not establish extra-territorial taxation).[6]

---

[6] For example, it has been suggested that including *dividends* paid by foreign corporations in the apportionable income base of the recipient corporation creates a risk of unfair distortion because the foreign corporation's property, payroll and sales are not reflected in the denominator of the apportionment formula. See *Mobil*, 445 U.S. at 461 (Stevens, J., dissenting); *Container*, 463 U.S. at 168 n.5; *NCR*, 544 A.2d at 775, 778, 781; P. Hartman, *supra*, at 442 (noting possible confusion of criteria for apportionment and combined reporting).

This case, however, concerns only capital gains and interest resulting from Corning's business decision to liquidate its substantial Owens Corning Fiberglass stock asset. Unlike dividends which are the product of another corporation's business decisions and activities, capital gains and interest are the product of the asset owner's decision to sell the asset. There is, therefore, no basis for adjusting the apportionment formula to reflect the asset-purchaser's property, payroll and sales.

Excluding income from intangibles unless the state can prove a unitary income-payor creates—indeed virtually guarantees—a significant opportunity for tax-avoidance. It is "to eliminate from the reach of the taxing power a large portion of the wealth of the country." *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185, 219 (1897). State tax officials are naturally at a disadvantage when it comes to unraveling the complexities of multistate, multinational, multicorporate transactions. Requiring states to prove a unitary income-payor creates an incentive for corporations to structure transactions so as to insure payment by non-unitary payors. Moreover, placing the burden of proof on the state tax officials to prove the existence of a unitary business is directly contrary to this Court's instruction in *Container*, 463 U.S. at 164, where the Court required the corporation to prove "by clear and cogent evidence" that extraterritorial values were being taxed. *See also, Mobil*, 455 U.S. at 442 (corporation failed to sustain its burden of proving that dividend income was derived from unrelated business activity).

Inconsistent interpretations of *ASARCO* also create a risk that some taxpayers will be subjected to multiple taxation on their income from intangibles, whereas others will avoid taxation entirely. For example, a taxpayer domiciled in a state adopting a broad interpretation of *ASARCO* may be fully taxed on its income from intangibles by its state of domicile even though the same income is taxed on an apportioned basis by other states that adopt a narrower, fact-based view of *ASARCO*. Conversely, a corporation may be exempt from tax in its state of domicile yet also able to avoid fairly apportioned taxation in states like Virginia where the corporation operates under overly broad interpretations of *ASARCO*. A uniform interpretation by this Court is needed to put an end to what is both an inherent inconsistency and an opportunity for corporate-structured tax avoidance.

The unitary business principle was developed to facilitate, not frustrate, legitimate state taxation. As this Court held over a half century ago in *J.C. Penney*, the constitutional due process test

> is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

311 U.S. at 444-45.

A state that confers on a taxpayer the substantial privilege of carrying on business is entitled to tax all of the unitary business' income, including income from intangibles, on a fairly apportioned basis. *Id.* at 445-46. *Accord*, *Mobil*, 445 U.S. at 445-46.

CONCLUSION

Virginia's Petition raises issues with a significant impact in the field of state taxation of income that are of vital concern to the Amici. The Petition raises important questions of federal law which have not been, but should be, settled by this Court. Those questions of federal law have been decided by the Virginia Supreme Court in a way that conflicts with decisions of other state courts of last resort and misapplies the decision of this Court in *ASARCO*. Therefore, we urge this Court to grant Virginia's Petition for a Writ of Certiorari and to give plenary consideration to the matter.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GERALD LANGBAUM *
Assistant Attorney General

JOHN K. BARRY
Assistant Attorney General

Louis L. Goldstein Treasury Bldg.
Calvert & Northwest Streets
P. O. Box 466
Annapolis, Maryland 21404
(301) 974-2808

* *Counsel of Record for Amici Curiae*

WINSTON BRYANT
Attorney General
of Arkansas

RICHARD BLUMENTHAL
Attorney General
of Connecticut

CHARLES M. OBERLY III
Attorney General
of Delaware

ROLAND W. BURRIS
Attorney General
of Illinois

LINLEY E. PEARSON
Attorney General
of Indiana

BONNIE J. CAMPBELL
Attorney General
of Iowa

J. JOSEPH CURRAN, JR.
Attorney General
of Maryland

FRANK J. KELLEY
Attorney General
of Michigan

HUBERT H. HUMPHREY, III
Attorney General
of Minnesota

JOHN P. ARNOLD
Attorney General
of New Hampshire

ROBERT J. DEL TUFO
Attorney General
of New Jersey

TOM UDALL
Attorney General
of New Mexico

LACY H. THORNBURG
Attorney General
of North Carolina

NICHOLAS J. SPAETH
Attorney General
of North Dakota

ERNEST D. PREATE, JR.
Attorney General
of Pennsylvania

T. TRAVIS MEDLOCK
Attorney General
of South Carolina

R. PAUL VAN DAM
Attorney General
of Utah

JEFFREY L. AMESTOY
Attorney General
of Vermont

MARIO J. PALUMBO
Attorney General
of West Virginia

JAMES E. DOYLE
Attorney General
of Wisconsin